NO. 46025-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

SHALISA HAYES, as the personal representative of THE ESTATE OF BILLY RAY SHIRLEY III,

Respondents,

v.

BILL'S TOWING AND GARAGE, INC., a Washington corporation, and THOMAS A. LOMIS and JANE DOE LOMIS, and the marital community composed thereof,

Appellants,

and RICHARD E. WELCH and JANE DOE WELCH, and the marital community composed thereof; and KOLLECTED SOULS SECURITY, a Washington Sole Proprietorship owned by RICHARD WELCH,

Defendants.

BRIEF OF APPELLANTS BILL'S TOWING AND GARAGE, INC. AND THOMAS A. LOMIS

Mary H. Spillane, WSBA #11981
Timothy L. Ashcraft, WSBA #26196
WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Appellants Bill's Towing and Garage, Inc. and Thomas A. Lomis

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98101
(206) 628-6600

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I. INTRODUCTION

This wrongful death action arises out of the unsolved killing of 17-year-old Billy Ray Shirley who was killed while attending an unauthorized "after hours club" in Tacoma on August 27, 2011. Billy Ray's mother, Shalisa Hayes, sued Tom Lomis, the owner of the building where Billy Ray died, and Tom Lomis' business, Bill's Towing and Garage, Inc. (collectively "Bill's Towing"), as well as Richard Welch, who leased part of the property from Tom Lomis, and Kollected Souls Security, a motor-cycle club run by Welch. Ms. Hayes asserted that the building where the killing occurred had numerous deficiencies and code violations that did not allow Billy Ray to escape when gunshots occurred on the property that morning, causing her son's death.

Tom Lomis has owned the two-story building at issue for many years. The first story of the building historically has been used for storage and is normally unmanned. Over the years, the top story of the building had been leased to various people and businesses for storage.

In September 2010, the top floor was leased to Richard Welch. At trial, there was conflicting evidence as to how Welch would use the building. Bill Lomis, Tom's brother and the manager of Bill's Towing, testified that Welch said he was only going to use the property for storage and to possibly teach his kids karate, while Welch testified that he told Bill

Lomis that he was going to hold social gatherings and consume alcohol on the premises, and do work on his motorcycles and cars.

As of July 1, 2011, Welch had vacated the premises. Welch claimed that he turned the lease over to another motorcycle group known as the Global Grinders. He acknowledged, however, that he never sought or received permission to sublease the premises, as required by his lease.

Before vacating the property, Welch had at least three encounters with Billy Ray, when Billy Ray attempted to come onto the property. Each time, Welch sent Bill Ray away, and told him that he was not welcome on the property.

Unbeknownst to Bill's Towing, on August 27, 2011, Global Grinders was operating an after-hours club on the property. Billy Ray, along with two friends, arrived at the club after 2 a.m. Gunshots erupted and people scattered. A witness saw Billy Ray outside of the building after the first round of shots. Billy Ray, however, decided to go back inside, where he was killed by a second round of gunshots, although no one witnessed his killing.

The jury rendered a verdict for plaintiff, finding Bill's Towing 40%, and Welch/Kollected Souls 60%, at fault. Even though Welch's liability in this lawsuit previously had been discharged in bankruptcy, judgment was entered against all defendants, including Welch.

Several trial court errors require reversal of the judgment. First, the jury was not allowed to consider the fault of the deceased, Billy Ray Shirley. Second, the jury was not allowed to consider whether Billy Ray was a trespasser and thus was not instructed on the lesser duty landowners owe to trespassers. Third, the trial court denied Bill's Towing's motion for a directed verdict, even though there was no evidence that any alleged negligence of defendants proximately caused Billy Ray's death. Finally, despite Welch's previous discharge of any liability in bankruptcy, the trial court entered judgment against all defendants, creating joint and several liability for Bill's Towing, while at the same time precluding Bill's Towing from exercising any right of contribution against Welch/Kollected Souls, in contravention of Washington law.

This Court should reverse and direct entry of judgment in favor of Bill's Towing because there is no evidence that any negligence by Bill's Towing or Tom Lomis caused Billy Ray's death. Alternatively, the Court should remand for a new trial with instructions (1) to allow the jury to allocate fault to Billy Ray and determine whether he was a trespasser; and (2) to preclude any entry of judgment against Welch because of his discharge in bankruptcy.

II. ASSIGNMENTS OF ERROR

The trial court erred in:

(1) Granting plaintiff's pre-trial motion to strike Bill's Towing's defense of comparative fault defense and not allowing the jury to allocate fault to Billy Ray Shirley;

(2) Denying the defense motion for a directed verdict based on lack of causation;

(3) Not giving proposed jury instructions regarding Billy Ray being a trespasser and the duty owed to a trespasser;

(4) Entering judgment against Welch, resulting in joint and several liability between him and Bill's Towing, while eliminating Bill's Towing's statutorily mandated contribution rights against Welch.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

(1) Did the trial court err in granting plaintiff's motion to strike Bill's Towing's comparative fault defense (a) when there was evidence indicating that Billy Ray Shirley was negligent; (b) when the issue of whether Billy Ray was killed by an intentional tort was never pleaded nor proved and is irrelevant; and/or (c) because the emergency doctrine does not apply and, even if it did, would not justify striking the comparative fault defense, but would only justify submitting the emergency doctrine issue to the jury? (Assignment of Error No. 1).

(2) Did the trial court err in denying Bill's Towing's motion for a directed verdict when there was no evidence of causation, leaving the jury to speculate on whether its alleged negligence caused Billy Ray's death? (Assignment of Error No. 2).

(3) Did the trial court err in refusing to give jury instructions related to Billy Ray being a trespasser and the associated duty owed to trespassers when there was evidence in the record that Billy Ray did not have permission to be on the property? (Assignment of Error No. 3).

(4) Did the trial court err in entering judgment against Welch when his debt from this lawsuit had already been discharged in bankruptcy and when entry of judgment against Welch resulted in joint and several liability for Bill's Towing, while the judgment as entered precluded any right of contribution against Welch? (Assignment of Error No. 4).

(5) If, based on the Court's resolution of the issues identified above, this Court determines that it should remand this case for a retrial, should the retrial be limited to a retrial of the liability and allocation of fault issues, but not a retrial of damages?

IV. STATEMENT OF THE CASE

A. Factual Background.

Tom Lomis has worked for Bill's Towing since 1966 and has been its owner since 1971. RP 637. Tom's brother, Bill Lomis, manages the

business. RP 606. In the 1980s, Tom Lomis bought the property at issue located at 1651 Center Street in Tacoma and consisting of a lot and a two-story building. RP 637-788, 598-600, 686. Bill's Towing has used the lot and the building's first story for personal storage and to house impounded vehicles. RP 598-99. The property is not Bill's Towing's main office and is normally unmanned. RP 598. The building's top story has also been used for storage and, at times, has been rented to tenants for storage. *See* CP 599-601. There have been long periods of time, even several years, when the building's top story was not leased. RP 601. On occasion, Jimmy Kelly, a Bill's Towing employee who also worked with police K-9 units, has used the property and sometimes trained dogs on the site. RP 599, 714, 719.

In September 2010, the property was leased to Welch. RP 602. Welch had responded to an advertisement regarding rental of the top story of the building for storage. RP 603. Welch indicated that he had been renting storage units that were getting rather expensive, and thought that the advertised rent of $600 for 3000 square feet of space was very cheap rent. RP 603. According to Bill Lomis, there was an understanding that the property would be used for storage. RP 603. Bill Lomis testified that Welch never stated that he was the leader of a motorcycle club called Kollected Souls and never indicated that he intended to use the space for

club gatherings that included drinking. RP 604, 630. If he had, Welch would not have been allowed to rent the space. RP 604-05; *see also* RP 653.

Welch, however, testified that he told Bill Lomis that "[w]hat I actually rented it for was a social gathering and to do mechanic work on my motorcycles and cars." RP 471. He also testified that he told Bill Lomis that he intended to consume alcohol on the premises. RP 471-72. He admitted, however, that Bill Lomis told him that, although previous tenants had held parties on the premises, they were trying to avoid those in the future. RP 496.

Shortly after the lease was signed, Bill Lomis went to the facility to fix a leak in the roof that Welch had reported. RP 608-09. Welch was not there, and Bill observed furniture, boxes of clothes and children's toys stacked up, punching bags hanging from the ceiling, and mats on the floor in the space.[1] RP 609. According to Bill Lomis, when Welch rented the space he had said that he wanted to use the space to move furniture and stuff from storage units, teach his children karate, and bring in a sewing machine to do some upholstery work for himself, but nothing was going to be open to the public. RP 609-10. At trial, however, Welch testified that

[1] It took a month or month and a half for Bill's Towing to get the roof leak fixed. Bill Lomis made maybe five trips out to the property during that time and saw no signs that the property was being used as a bar or for drinking. RP 610-11.

he was making changes to the space, including constructing an inner wall to help him control the flow of customers at his "club" and to keep down violence. RP 472-74. He maintained that any parties that he had were private, in that he sent invitations only to specific people. RP 594-95.

Bill Lomis later received word from Jimmy Kelly that there might be parties going on at the property. RP 612. After hearing this, Bill called Welch and reiterated that no parties were to be held on the property. Welch told him it was only a private birthday party. RP 613. Tom Lomis continued to check occasionally to confirm that no parties were being held on the site. RP 614, 649.

Subsequently, Bill Lomis received a call from police about a party on the premises. RP 615. Lomis went to the property and told Welch to vacate the premises immediately because of the parties, but Welch asked for two weeks to collect his belongings. RP 615-16. At no time did Welch tell Lomis that he was subleasing the property to anyone. RP 584, 616, 652-53.

Welch testified that Billy Ray previously had approached the premises on multiple occasions and had been turned away. RP 584-89. Welch told Billy Ray he was not old enough to enter the premises and was not welcome. RP 586, 589.

On July 1, 2011, Welch vacated the property. RP 583-84. He

claims that he turned over the lease to a motorcycle group known as "Global Grinders" but admitted that, under the lease with Bill's Towing, any subleases had to be in writing and with the permission of Bill's Towing. RP 583-84. Welch admitted that he did not get permission from Bill's Towing and there was no written sublease. RP 583-84. He admitted that he never told either of the Lomis brothers about his intent to turn his lease over to Global Grinders. RP 584, 652-53.

On August 27, 2011, the date of Billy Ray's death, Global Grinders held a gathering at the property. RP 374. The testimony regarding what occurred that morning came from two witnesses, Shauna Randall and plaintiff's expert, Mark Lawless.[2]

Shauna Randall is the mother of Ricky Washington, who was a friend of Billy Ray's. RP 362-63. She testified that she was present on the property, having arrived about 2:00 a.m. on the morning that Billy Ray died. RP 362. She had been to the building on a number of occasions, beginning in December 2010. RP 358-59, 368. According to Ms. Randall, the property was known as an after-hours club. RP 358-59. The after-hours club opened up about 2:00 a.m., after other bars normally closed. RP 369-70. When she left for the club the morning in question,

[2] Lawless, who had no have first-hand knowledge, based his testimony on his subsequent investigation and his review of the summary judgment declarations of Billy Ray's friends, Ricky Washington and Geno Horsley, who were at the property the morning that Billy Ray died. Neither Ricky nor Geno testified at trial.

her son Ricky, Billy Ray, and a third friend, Geno Horsley, were at her home. RP 363.

Ms. Randall understood that Global Grinders biker club was hosting the get together at the property. RP 374. She had seen business cards from Global Grinders which referenced the after-hours club. RP 375. Global Grinders had not always run the club, but started to do so in the warmer months of 2011. RP 376.

After Ms. Randall got to the club, her son Ricky, along with his friends, Billy Ray and Geno, arrived. RP 363. When Ricky found his mother, she asked him to leave and go home. RP 363-64. He left the room Ms. Randall was in, but came back about ten minutes later. RP 377. According to Lawless, once Billy Ray, Geno and Ricky arrived, they got into a fight with others. RP 317, 319, 336. After the fight, Billy Ray and Geno went outside, but Ricky remained inside the building. RP 319.

Everyone agreed that there were two sets of gunshots that night. RP 337-38; 365-66. Ms. Randall heard the first round of gunshots, but did not know where they came from. RP 365. She testified that her son Ricky, who was with her at that moment, jumped up and began looking for his friends. RP 366. He jumped out of a window. RP 366, 371-72. Ms. Randall then went to the window and looked out and saw Ricky standing with Billy Ray and Geno outside of the building. RP 366, 372.

According to Lawless, in the midst of the chaos, and believing Ricky was still inside, Billy Ray and Geno went back into the building to get Ricky. RP 317-19.

Ms. Randall then heard a second round of gunshots. RP 366. People were scrambling to get out and, when Ms. Randall got to the doorway, she found Ricky laid over Billy Ray's lap. RP 366-67. Ms. Randall yanked Ricky off of Billy Ray and began to do CPR on Billy Ray. RP 367. Unfortunately, Billy Ray died. Lawless testified that Ricky believed it was the second round of shots that killed Billy Ray. RP 338.

At trial, Billy Ray's mother, Shalisa Hayes, claimed that there were numerous code violations and other deficiencies in the building that caused or contributed to Billy Ray's death. RP 163-66. Mr. Lawless testified that there were no illuminated exit signs and no "panic bars" on the doors. RP 300-01, 305-06. Additionally, he took issue with the number of exits and the ingress and egress out of available exits. RP 307-12, 320-22. Ms. Hayes claimed that these problems prevented Billy Ray from escaping the building, causing his death. RP 856-58.

B. Procedural Background.

Ms. Hayes initially sued Bill's Towing and Garage. CP 1-4. She later amended the lawsuit to include Tom Lomis individually, as well as Welch and Kollected Souls. CP 9-13. Her complaint stated claims for

negligence, premises liability and Consumer Protection Act violations. CP 12. No intentional tort allegations were pleaded. *See* CP 9-13.

1. Plaintiff's motion to dismiss the affirmative defense of comparative fault as to Billy Ray Shirley.

In its Answer, Bill's Towing asserted as an affirmative defense that Billy Ray was comparatively negligent. CP 6, 188. Just before trial, Ms. Hayes moved to dismiss that affirmative defense and to preclude any allocation of fault to Billy Ray. CP 253-60. Ms. Hayes argued that: (1) Billy Ray was killed from an intentional tort and thus no comparative fault is available; (2) there was no evidence of comparative fault; and (3) Billy Ray was not negligent because he was responding to an emergency. The trial court granted Ms. Hayes' motion and dismissed the comparative negligence affirmative defense. CP 616-17; 12/6/13 RP at 21.

At the time the court granted Ms. Hayes' motion to dismiss the comparative fault affirmative defense, the following facts were in the record: (1) Billy Ray had tried to enter the premises at least three times before the day he was killed and was turned away by Welch, CP 364-65; (2) Billy Ray got into a fight at the property the morning he died, CP 621; (3) when the fight subsided, Billy Ray went outside the building, but despite the firing of gunshots, voluntarily went back into the building because his friend Ricky went back inside, CP 622, 628.

Those same facts evidencing Billy Ray's contributory fault came out at trial without objection and largely through plaintiff's own witnesses. At the close of the evidence, Bill's Towing moved to conform the pleadings to the evidence and to allow it to argue contributory fault. RP 742-43. The trial court denied the motion on grounds of purported "failure of proof." RP 749; *see also* RP 777.

2. Bill's Towing's motion for directed verdict.

At the close of plaintiff's case, Bill's Towing moved for directed verdict based on the lack of evidence that any of the alleged building deficiencies were a proximate cause of Billy Ray's death. RP 572-80. The trial court denied the motion. RP 580.

3. Motions concerning Billy Ray's status as a trespasser

Before trial, Ms. Hayes moved to preclude all references to Billy Ray being a trespasser. CP 377-80. The defense objected, pointing to the testimony from Welch that he had told Billy Ray that he was not welcome on the property. CP 364-65. The court reserved ruling on the motion, and instructed the parties not to refer to Billy Ray as a trespasser or as an invitee in opening statements. RP 54-61. Bill's Towing proposed jury instructions based on Billy Ray's status as a trespasser. CP 399, 400, 417. The court declined to give those proposed jury instructions, stating that there was no evidence that Billy Ray was a trespasser on the day he was

killed. RP 762-63, 775.

4. Bill's Towing's motions related to Welch's bankruptcy and joint and several liability.

Before trial, Welch filed for bankruptcy. His list of debts included any judgment from this litigation. CP 126, 543. His bankruptcy was finalized prior to trial of this case, and any judgment from this litigation was discharged in the bankruptcy. CP 286-93. Ms. Hayes then obtained relief from the automatic bankruptcy stay, allowing her to continue with the litigation, but with the limitation that "no money judgment shall be entered personally against Richard and Jennifer Welch." CP 546-47.

Bill's Towing raised the bankruptcy issue in its Answer and brought a pre-trial motion to exclude Welch as a party for the purpose of establishing joint and several liability. CP 188, 279-83. The court denied the motion, and indicated that the issue would be addressed after trial if necessary. RP 110-17.

After the jury's verdict, Ms. Hayes returned to the bankruptcy court and sought to amend the prior bankruptcy court order to allow judgment to be entered against Welch. CP 514-15, 521-25. The stated purpose of this motion was so that joint and several liability would apply to Bill's Towing. CP 521-25, 532-33. Welch objected to any order that would allow judgment to be entered against him. CP 534-38. Ms. Hayes'

attorney acknowledged in the bankruptcy court that a "consequence of the discharge [in bankruptcy] is that Bill's Towing cannot seek contribution of the debtor Welch." CP 594.

The bankruptcy court entered an amended order, allowing judgment to be entered against Welch. CP 598-99. The amended order provided that plaintiff may not seek to collect on the judgment from Welch and that Bill's Towing may not "seek to collect any recovery for contribution or indemnity from Debtors [Welch]." CP 599.

Ms. Hayes brought a Motion to Enter Judgment based on the amended bankruptcy order. CP 474-78. Bill's Towing opposed entry of that judgment, arguing that Washington law mandates a right of contribution and the amended bankruptcy order precludes such contribution. CP 495-507. The trial court entered judgment against all defendants, including Welch. CP 600-03. The Findings of Fact in the Judgment reference the amended bankruptcy order and state that co-defendants (Bill's Towing) may not seek contribution from Welch. CP 602. The Conclusions of Law provide that "[n]o collection action shall be taken against Defendant Welch consistent with the Bankruptcy Order issued on February 13, 2014." CP 602.

V. SUMMARY OF ARGUMENT

The trial court committed several errors requiring reversal of the

judgment. First, the trial court erred in granting Ms. Hayes' pre-trial motion to dismiss any comparative fault of the deceased, Billy Ray Shirley. Ms. Hayes' legal arguments supporting the motion – that allocation was improper because Billy Ray was the victim of an intentional tort or that he was faced with an emergency – were specious and did not support the granting of the motion. Factually, there was evidence before the court indicating that Billy Ray was comparatively at fault. Then, after the evidence giving rise to Bill's Towing's affirmative defense of Billy Ray's contributory negligence was admitted without objection and largely through plaintiff's own witnesses, the trial court compounded its error by refusing Bill's Towing's request that the jury be allowed to allocate fault to Billy Ray.

Second, the trial court erred in not allowing the jury to decide if Billy Ray was a trespasser on the day he died. There was evidence at trial that Billy Ray did not have permission to be on the property. At a minimum, whether Billy Ray was a trespasser or an invitee presented a factual issue that the jury should have been permitted to decide. The court erred in taking that decision away from the jury.

Third, the trial court erred in denying Bill's Towing's motion for directed verdict. Irrespective of Ms. Hayes' allegations of negligence, there was no evidence that any alleged building deficiency or any other

alleged negligence of Bill's Towing caused Billy Ray's death. No one saw Billy Ray get shot. The jury could only impermissibly speculate as to whether any particular building problem proximately caused, or even contributed to, Billy Ray's death.

Fourth, the trial court erred in entering judgment against Welch, so as to create joint and several liability against Bill's Towing, while at the same time precluding Bill's Towing's statutory right of contribution. Welch's liability from this lawsuit was previously discharged in bankruptcy. The bankruptcy court allowed judgment to be entered in this case against Welch only if Bill's Towing was precluded from enforcing its contribution rights. The trial court entered judgment imposing those conditions. Under Washington law, if Bill's Towing has joint and several liability and, as a result, is made to pay for Welch's proportionate share of fault, then Bill's Towing has a statutory right to contribution against Welch, which the trial court had no authority to abrogate.

VI. ARGUMENT

A. The Trial Court Erred in Granting Ms. Hayes' Motion to Strike Bill's Towing's Comparative Fault Affirmative Defense.

Procedurally, because the trial court considered matters outside of the pleadings, *see, e.g.*, CP 328-67, Ms. Hayes' motion to strike Bill's Towing's comparative fault affirmative defense, CP 253-60, is treated as a motion for summary judgment for purposes of appellate review. *Stack v.*

Chicago, Milwaukee, St. Paul & Pac. R.R. Co., 94 Wn.2d 155, 157, 615 P.2d 457 (1980). The summary judgment standard of review is de novo.[3] *Burton v. Twin Commander Aircraft, LLC*, 171 Wn.2d 204, 212, 254 P.3d 778 (2011). Additionally, the trial court's striking of the affirmative defense involves issues of law and statutory interpretation, which are also subject to de novo review. *See, e.g., Barton v. Dep't of Transp.*, 178 Wn.2d 193, 202, 308 P.3d 597 (2013).

Ms. Hayes' motion to dismiss the defense of comparative negligence was based on three arguments: (1) comparative fault was not available because Billy Ray was purportedly the victim of an intentional tort; (2) Billy Ray was not negligent and did not cause or contribute to his own death; and (3) Billy Ray acted reasonably in an emergency situation. The trial court appeared to grant the motion based on the argument that comparative fault was not available because Billy Ray died from an intentional tort.[4] 12/6/2013 RP at 21. Regardless, all of Ms. Hayes' arguments for dismissal of the comparative fault affirmative defense fail.

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[3] Even if considered a motion to strike under CR 12(b), the standard of review is still de novo. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005).

[4] At trial, however, after the evidence presented on summary judgment was adduced at trial without objection and largely from plaintiff's own witnesses, the trial court still rejected Bill's Towing's request that the jury be allowed to apportion fault to Billy Ray, based upon its view that there was lack of evidence as to Billy Ray's contributory fault. RP 748-49.

1. The trial court erred in holding that comparative fault was not available as a defense.

Ms. Hayes argued that comparative fault was not available because Billy Ray died from an intentional tort. Legally, this is irrelevant, as discussed below. Factually, no one knows the specific circumstances of how Billy Ray died. There was no evidence presented that his death was the result of an intentional act and the jury never considered this issue. More importantly, no intentional torts were pleaded. The Amended Complaint asserts claims for negligence, premises liability and Consumer Protection Act violations. CP 9-13. The allegations against Bill's Towing all sounded in negligence, not intentional tort. *Id.*

Because the only claims in the case were negligence (and thus fault-based) claims,[5] RCW 4.22.070(1) required allocation of fault. RCW 4.22.070(1) provides that "the trier of fact ***shall*** determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages" and that potentially at fault entities include the plaintiff (or decedent).

If Billy Ray's death resulted from an intentional tort, it is true that "fault" as defined in RCW 4.22.015 does not include intentional torts, such that fault would not be allocated to the intentional tortfeasor. *See,*

[5] Under RCW 4.22.015: "'Fault' includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others ...."

e.g., Tegman v. Accident & Med. Inves., Inc., 150 Wn.2d 102, 109-110, 117, 75 P.3d 497 (2003). In *Tegman*, 150 Wn.2d at 116, the court held that "intentional tortfeasors are not entitled to the benefit of proportionate liability; the negligent defendant is not entitled to apportion fault to an intentional tortfeasor." But this does not prevent fault from being apportioned to every at-fault entity except the intentional tortfeasor. Rather, RCW 4.22.070 requires apportionment to every other at-fault entity. As much as Ms. Hayes may wish it otherwise, RCW 4.22.070 does not provide that, when both intentional torts and negligence are involved, fault is allocated to all negligent entities ***except*** the claimant.

Moreover, the case law Ms. Hayes cited to the trial court is inapposite, as it addressed the issue of allocating negligence in the face of claims of intentional torts. In *Morgan v. Johnson*, 137 Wn.2d 887, 976 P.2d 619 (1999), a former married couple ended up in a fight and the ex-wife sued her ex-husband for injuries related to the encounter. The issue on appeal was whether the intoxication defense was available to the defendant. The key to the analysis was that the plaintiff dropped all negligence claims prior to trial. "At trial, Morgan waived any claims based upon negligent conduct and restricted her case to the intentional torts of assault and battery." *Id.* at 890. The court determined that the intoxication defense did not apply in the context of intentional torts. *Id.* at

896-97. It is inapplicable here, given that the claims against defendants sounded in negligence.

Likewise, *Welch v. Southland*, 134 Wn.2d 629, 635, 952 P.2d 162 (1998), cited by Ms. Hayes below, also dealt with apportioning fault among intentional tortfeasors. The court concluded that "[u]nder the current statutory definition of *fault*, a defendant is not entitled to apportion liability to an intentional tort-feasor." *Id.* at 636-37. Here, Bill's Towing did not seek to apportion fault to an intentional tortfeasor; it sought to apportion fault to Billy Ray based upon his own negligence.[6]

As a matter of law, comparative fault was not precluded. To the extent that the trial court based its decision to dismiss Bill's Towing's affirmative defense of Billy Ray's contributory negligence on grounds that Billy Ray's death occurred as a result of some unidentified person's intentional tort, the trial court erred.

2. If the trial court based its dismissal of the comparative fault defense on lack of evidence grounds, it also erred.

The second possible basis for the trial court's pre-trial ruling was Ms. Hayes' argument that there was a lack of evidence of Billy Ray's

[6] Even if intentional torts had been pleaded in this case, allocation of damages (rather than fault) still would have been appropriate. *Tegman*, 150 Wn.2d at 117 (holding that "where the damages result from both intentional acts and omissions and 'fault,' i.e., negligence, recklessness, and conduct subjecting the actor to strict liability, the damages resulting from the intentional acts and omissions must be segregated from damages that are fault-based.").

contributory fault. To the extent the trial court determined that no evidence of comparative fault existed, it erred.

"Clearly, the issue of contributory negligence is a jury question unless the evidence is such that all reasonable minds would agree that the plaintiff had exercised the care which a reasonably prudent man would have exercised for his own safety under the circumstances." *Lundberg v. All-Pure Chem. Co.*, 55 Wn. App. 181 187, 777 P.2d 15, *review denied*, 113 Wn.2d 1030 (1989) (quoting *Stevens v. State*, 4 Wn. App. 814, 816, 484 P.2d 467 (1971) (citing *Poston v. Mathers*, 77 Wn.2d 329, 462 P.2d 222 (1969)). "Further, all evidence and reasonable inferences must be interpreted in the light most favorable to the challenging party." *Lundberg*, 55 Wn. App. at 187.

At the hearing on the motion to dismiss the contributory negligence affirmative defense, the following evidence was before the trial court: (1) Billy Ray tried to enter the premises at least three times before the day he was killed and was turned away by Welch, CP 364-65; (2) Billy Ray got into a fight at the property on the morning he died, CP 621; and (3) the fight subsided and Billy Ray went outside the building and then voluntarily re-entered the building, purportedly because his friend, Ricky Washington, was still inside, CP 622, 628.

Given that all facts and inferences must be interpreted in favor of

Bill's Towing, a jury could conclude from these facts that Billy Ray was contributorially negligent. He went to a property where he knew he was not welcome and got into a fight. When the fight subsided, he escaped the dangerous situation of the fight and went outside, but then voluntarily re-entered the building and re-endangered himself, despite the eruption of gunfire. A reasonable jury could find and should have been permitted to find that, under the circumstances, Billy Ray failed to exercise reasonable care for his own safety and was therefore negligent, and that such negligence was a proximate cause of his death. If the trial court based its ruling on a lack of evidence, it erred.

3. To the extent the trial court relied on the emergency doctrine in granting the motion to strike the comparative fault defense, it also erred.

In moving to strike the comparative fault affirmative defense, Ms. Hayes also argued that Billy Ray was not negligent as a matter of law because he was placed in an emergency situation. CP 258-59. Although it does not appear the trial court relied on this argument in granting the motion, 12/6/13 RP at 21, the emergency doctrine does not provide support for precluding the jury from determining Billy Ray's comparative fault. Whether the emergency doctrine applies to a set of facts is an issue subject to de novo review. *Tuttle v. Allstate Ins. Co.*, 134 Wn. App. 120, 131, 138 P.3d 1107 (2006).

The emergency doctrine, as set forth in WPI 12.02, does not absolve someone of negligence. Rather, it allows the jury to consider the emergency situation in determining whether a person's actions were reasonable. WPI 12.02 provides as follows:

> A person who is suddenly confronted by an emergency through no negligence of his or her own and who is compelled to decide instantly how to avoid injury and who makes such a choice as a reasonably careful person placed in such a position might make, is not negligent even though it is not the wisest choice.

The evidence in this case did not support the use of the emergency doctrine. The doctrine is not appropriate when the person's own negligence contributed to the emergency. *Sandberg v. Spoelstra*, 46 Wn.2d 776, 782-83, 285 P.2d 564 (1955). Here, Billy Ray contributed to the alleged emergency by: (1) being on the property at all (he was a trespasser); (2) getting into a fight; and (3) going back into the building after successfully getting out of the building.

Moreover, the emergency doctrine is only appropriate when a person needs to make an instinctual reaction to a sudden emergency situation. *Tuttle*, 134 Wn. App. at 131. Here, there was evidence that, rather than being faced with an instinctual decision, Billy Ray made the conscious and deliberate choice to go back into the building to help his

friend. However laudable that goal may have been, it does not satisfy the requirements of the emergency doctrine.

Even if the emergency doctrine were applicable, it would not have justified summary dismissal of the affirmative defense concerning Billy Ray's contributory fault. At most, it would have justified a jury instruction on the issue.

To the extent the trial court relied on the emergency doctrine in granting Ms. Hayes' motion to dismiss the affirmative defense of Billy Ray's comparative fault, the trial court erred.

B. The Trial Court Erred in Not Allowing the Jury to Allocate Fault to Billy Ray Pursuant to RCW 4.22.070.

The testimony presented at trial, largely by Ms. Hayes' own witnesses, evidenced Billy Ray's negligence. At the close of the evidence, Bill's Towing moved to conform the pleadings to the proof and to allow Bill's Towing to argue Billy Ray's comparative fault. RP 742-743. The trial court denied that motion because of a purported "failure of proof." RP 749; *see also* RP 777.

In determining whether a defendant properly invoked the fault allocation procedure under RCW 4.22.070, the standard of review is de novo. *Estate of Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 857, 313 P.3d 431 (2013).

> [I]n evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury. A refusal to give a requested jury instruction constitutes reversible error where the absence of the instruction prevents the defendant from presenting his theory of the case.

State v. Buzzell, 148 Wn. App. 592, 598, 200 P.3d 287, review denied, 166 Wn.2d 1036 (2009) (internal citations and quotations omitted).

The relevant evidence regarding Billy Ray's contributory fault came in without objection. Under CR 15(b):

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.

Thus, when evidence comes in without objection, the pleadings will be deemed to conform to the proof. *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 766-67, 733 P.2d 530 (1987). Here, because the evidence regarding Billy Ray's fault was admitted without objection, the pleadings should have been deemed to conform to that proof.

The trial court erred in refusing to allow the jury to allocate contributory fault to Billy Ray. In actions involving the fault of more than one entity, subject to exceptions not relevant here, RCW 4.22.070(1)

requires the jury to determine the percentage of the total fault which is attributable to every at-fault entity.

Here, the evidence supported allocation of fault to Billy Ray. Welch testified that he had previously turned away Billy Ray multiple times and told him he was not welcome. RP 584-89. Despite previously having been told that he was not welcome, Billy Ray entered the property on the early morning of his death. RP 363. There was evidence that, once there, Billy Ray, Geno and Ricky got into a fight with others. RP 317, 336. After the initial altercation, Billy Ray and Geno got outside of the building. RP 319. They were two sets of gunshots that night and, after the first gunshots, Shauna Randall looked out the window and saw Ricky with Billy Ray and Geno outside of the building. RP 366, 372. Billy Ray then went back inside the building where he was killed. RP 317-19.

The accounts from various witnesses allowed the jury to conclude that Billy Ray: (1) was present on property where he was not permitted; (2) got into a fight; (3) was able to exit the building where the fight had occurred; (4) then, despite the eruption of gunfire, went back into the building; and (5) was shot when he went back in the building. From these facts, a jury could find that Billy Ray was negligent in going to the property in the first place, getting into a fight and going back into a building where he had just been fighting and where shots had previously

been fired. Under RCW 4.22.070, the jury should have been permitted to allocate fault to Billy Ray, and the trial court erred in refusing to allow the jury to do so.

C. The Trial Court Erred in Refusing to Give Jury Instructions Related to Billy Ray's Status As a Trespasser.

Bill's Towing offered Proposed Jury Instruction Nos. 1, 2 and 14, taken from WPI 120.01, 120.02, and 14.01, respectively, relating to Billy Ray Shirley's status as a trespasser and the duties owed by a landlord to a trespasser. CP 399, 400, 417. The trial court refused to give those instructions to the jury. RP 758-63, 775. This was error.

"A trial court's decision to give a jury instruction is reviewed de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact." *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). Jury instructions must be sufficient to allow the parties to argue their theories of the case. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 165, 876 P.2d 435 (1994); *Burchfiel v. Boeing Corp.*, 149 Wn. App. 468, 491, 205 P.3d 145, *review denied*, 166 Wn.2d 1038 (2009). Whether that standard has been met is a question of law also subject to de novo review. *Burchfiel*, 149 Wn. App. at 491. Here, it was Bill's Towing's theory, with evidence to support it, that Billy Ray was a trespasser, giving rise to a duty on the part of Bill's Towing only to not commit willful or wanton

misconduct. Bill's Towing was entitled to instructions that would have enabled it it to argue that theory. The standard of review, thus, is de novo.

A landowner's duty to a person on his or her land depends upon the status of the person as a trespasser, licensee or invitee. *Afoa v. Port of Seattle*, 176 Wn.2d 460, 467, 296 P.3d 800 (2013). A landowner's duty toward a trespasser is only a duty "not to commit willful or wanton misconduct." WPI 120.02 (citing, *e.g.*, *Zuniga v. Pay Less Drug Stores, N.W.*, 82 Wn. App. 12, 917 P.2d 584 (1996)). A landowner's duty toward a licensee or invitee, however, is one of ordinary care. WPI 120.02.01 (providing that a landowner has a duty to use ordinary care with respect to dangerous conditions on the property which the licensee cannot be expected to have knowledge); WPI 120.06 (providing that a landowner owes a duty of ordinary care to an invitee).

Bill's Towing's Proposed Jury Instruction No. 1, WPI 120.01, CP 399, would have told the jury that a trespasser is "a person who enters and remains upon the premises of another without permission or invitation, express or implied." Proposed Jury Instruction No. 2, WPI 120.02, CP 400, would have told the jury that "an owner or occupier or premises owes to a trespasser a duty not to commit willful or wanton misconduct." Proposed Jury Instruction No. 14, WPI 14.01, CP 417, would then have given the jury the standard definition of willful and wanton misconduct.

As to a person's status on property, "[w]hen the facts regarding a visitor's entry onto property are undisputed, the visitor's legal status as invitee, licensee, or trespasser is indeed a question of law. But when the facts are disputed, the question is one for the jury to decide." *Beebe v. Moses*, 113 Wn. App. 464, 467, 54 P.3d 188 (2002) (internal citations omitted); *see also* Note on Use to WPI 120.03 ("If the issue is whether or not there is permission to be on the premises, use WPI 120.01 and WPI 120.02 with this instruction, to submit the trespass issue."); Note on Use to WPI 120.05 ("If there are factual questions as to the status of the visitor as an invitee, licensee, social guest, or trespasser, the jury will need to be instructed on each relevant status and duty").

Welch testified that he had, on multiple occasions, told Billy Ray that he could not come on the property and was not welcome. RP 584-89. No evidence was presented that Billy Ray ever had the permission of Bill's Towing or Welch to be on the property. As such, Billy Ray was a trespasser under the definition set forth in WPI 120.01.

Ms. Hayes argued below that there was no evidence that Billy Ray was a trespasser on the day of his death. She cited no authority, however, for the proposition that someone who was a trespasser can become an invitee simply with the passage of time. In fact, the case upon which WPI 120.01 is based, *Winter v. Mackner*, 68 Wn.2d 943, 945, 416 P.2d 453

(1966),[7] suggests the opposite. In *Winter*, the court held that permission to enter property can be express or can be based on the fact "that the prior conduct of the owner be such as to lead one to believe that he has implied permission or an implied invitation to enter upon the owner's premises." *Id.* If permission can be implied from prior conduct, surely lack of permission can be implied from prior conduct as well.

Even with regard to the morning of the incident, there was no evidence presented at trial that Billy Ray had the permission of anyone to be on the premises. There was no evidence that Welch, the valid tenant, but who had vacated the property by July 1, 2011, RP 583-84, had given permission to Billy Ray. According to the evidence, Global Grinders was running (albeit unbeknownst to, and without the knowledge or consent of, Bill's Towing) an after-hours club on the property the morning that Billy Ray was killed. RP 374. The Global Grinders, however, were themselves trespassers as they had no valid lease to the premises. RP 583-84. There was no evidence that Global Grinders or anyone else gave permission for Billy Ray to be on the property, and even if Global Grinders had given him permission, it would have been permission granted by trespassers, not by the landlord, any valid tenant, or anyone with authority to grant such

[7] *See Comment* to WPI 120.01, stating that WPI 120.01 is based on *Winter v. Mackner* and cases cited therein.

permission. As trespassers themselves, Global Grinders had no ability to make Billy Ray anything but a fellow trespasser.

In light of the evidence that Welch had turned Billy Ray away from the property on multiple occasions and told him he was not welcome there, and in light of the absence of evidence that anyone else gave Billy Ray permission to be there, the trial court should have held that Billy Ray was a trespasser as a matter of law. Having not done that, at a minimum, the trial court should have allowed the jury to decide the issue. The trial court erred in refusing to give Bill's Towing's proposed instructions that would have allowed the jury to decide whether Billy Ray was a trespasser and, if it found he was, to decide whether Bill's Towing breached the duty not to commit willful and wanton misconduct that is owed to trespassers.

D. The Trial Court Erred in Denying Bill's Towing's Motion for a Directed Verdict Because There Was No Evidence that Any Alleged Negligence Of Bill's Towing Was a Proximate Cause of Billy Ray's Death.

At the close of plaintiff's case, Bill's Towing moved for a directed verdict for lack of evidence establishing proximate cause. RP 572-80. The trial court erroneously denied the motion. RP 580.

A directed verdict (or judgment as a matter of law) may be granted on an issue only if "there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that

issue." CR 50(a)(1). "The evidence must be considered in the light most favorable to the nonmoving party." *Ramey v. Knorr*, 130 Wn. App. 672, 676, 124 P.3d 314, *review denied*, 157 Wn.2d 1024 (2005). A trial court's ruling on a motion for a directed verdict is subject to de novo review. *Id.*

Regarding negligence, Ms. Hayes asserted numerous building issues including that a "side double door" violated the building code. RP 298-301. She also asserted that certain improvements, such as a bathroom, violated the building code. RP 304-05. She further argued that there were no illuminated exit signs and no "panic bars" on the doors. RP 306. Additionally, she took issue with the number of exits and the ingress and egress out of available exits. RP 307-12, 320-22. Although Ms. Hayes argued that these alleged deficiencies were a proximate cause of Billy Ray's death, there was no evidence from which a reasonable jury could so find without resort to impermissible speculation.

> Cause in fact refers to the "but for" consequences of an act—the physical connection between an act and an injury. Ordinarily, cause in fact is a question for the jury. But the court may decide this question as a matter of law if the causal connection is so speculative and indirect that reasonable minds could not differ. The cause of an accident may be said to be speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another. ***Stated differently, if there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury***

> ***will not be permitted to conjecture how the accident occurred.*** [Emphasis added; internal citations and quotations omitted.]

Moore v. Hagge, 158 Wn. App. 137, 148, 241 P.3d 787 (2010), *review denied*, 171 Wn.2d 1004 (2011).

There were no witnesses to Billy Ray's killing. There was no evidence adduced at trial as to: (1) where in the building Billy Ray was shot;[8] (2) where on his body Billy Ray was shot; (3) how many times he was shot; (4) whether he was stationary or moving when he was shot; (5) whether he was coming in, leaving or just standing there when he was shot; (6) where the shooter was; (7) how long Billy Ray had been in the building before he was shot; (8) whether he saw the shooter or the gun before he was shot; (9) whether he knew or suspected that he was going to be shot; (10) how many people, if any, were near him when he was shot; (11) whether he attempted to leave before he was shot; (12) whether, if he did attempt to leave before he was shot, any person or thing impeded his ability to get out of the building; (13) whether he was able to attempt to leave after he was shot; or (14) whether he actually attempted to leave after he was shot.

[8] There was evidence in the record that he was found in the doorway, but no evidence that he was in that spot when he was shot.

With this lack of evidence, the jury could only speculate as to whether any of the alleged building deficiencies contributed in any way to Billy Ray's death. If Billy Ray had not gone back into the building a second time, would he have been killed? If he was shot just as he walked into the building and never saw the gunman, would the alleged deficiencies have made any difference? If he saw the gunman and then stood his ground, trying to talk to the gunman and then was shot, did any of the alleged building issues contribute to his death? These are just a few of the myriad scenarios that could describe the events just before Billy Ray Shirley's death. No one knows what actually happened. And no one knows whether any of the alleged building deficiencies had anything to do with Billy Ray's death. The jury was left with nothing but impermissible speculation as whether any alleged building deficiency had anything to do with Billy Ray's death. Thus, the trial court erred in failing to grant Bill's Towing's motion for directed verdict.

E. The Trial Court Erred in Entering Judgment Against Richard Welch, Creating Joint and Several Liability, But Precluding Any Right of Bill's Towing to Contribution from Welch.

The trial court, over the objection of Bill's Towing, entered judgment against Mr. Welch, creating joint and several liability against Bill's Towing. CP 495-507, CP 600-03. This was error. Because this decision was based on an erroneous interpretation of the law of joint and

several liability and contribution, the standard of review is de novo. *Barton*, 178 Wn.2d 193 at 202.

Before trial in this case, Welch filed for bankruptcy, which was finalized before trial, discharging any debt he owed associated with this lawsuit. CP 286-93. Although Ms. Hayes got bankruptcy court permission to continue with the lawsuit, that permission was granted on the condition that "no money judgment shall be entered personally against Richard and Jennifer Welch." CP 546-47.

After the jury's verdict, Ms. Hayes returned to the bankruptcy court and sought to amend the prior bankruptcy court order to allow judgment to be entered against Richard Welch for joint and several liability purposes. CP 514-15, 521-25, 532-33. The bankruptcy court entered an amended order, allowing judgment to be entered against Welch, but precluding any contribution rights of Bill's Towing. CP 598-99.

Ms. Hayes then brought a Motion to Enter Judgment based on the amended bankruptcy court order, which Bill's Towing opposed. CP 474-78, 495-507. The trial court entered judgment against all defendants including Welch, CP 600-03, with findings of fact and conclusions of law precluding any right of contribution, CP 602.

Entry of that judgment was error. Under RCW 4.22.040, "[a] right of contribution exists between or among two or more persons who are

jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them." *See also Barton*, 178 Wn.2d at 203. Many courts have recognized that joint and several liability is a prerequisite to a contribution claim. *See, e.g., Barton*, 178 Wn.2d at 203; *Kottler v. State*, 136 Wn.2d 437, 442, 963 P.2d 834, (1998); *Elovich v. Nationwide Ins. Co.*, 104 Wn.2d 543, 554, 707 P.2d 1319 (1985); *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 886-87, 652 P.2d 948 (1982). In *Glass v. Stahl Specialty Co.*, 97 Wn.2d at 886-87, the court held that "[w]here there is no liability, there can be no joint and several liability. Where there is no joint and several liability, there is no right of contribution."

The bankruptcy court's amended order did not ***require*** the trial court to enter judgment against Welch. Rather, it ***permitted*** the trial court to enter judgment, if the trial court's entry of judgment could satisfy the two conditions: (1) that plaintiff could not seek to collect on the judgment; and (2) that co-defendants had no contribution claim. CP 599.

The trial court, then, could only enter judgment against Welch within those narrow parameters. Based on Washington law, however, the trial court could not satisfy both parameters and it was error for the trial court to enter a judgment that extinguished Bill's Towing's contribution rights. As RCW 4.22.040 and case law make clear, if there is joint and

several liability, then a right of contribution exists as a matter of law. The trial court did not have the authority to enter a judgment creating joint and several liability with Welch, while precluding Bill's Towing from being able to exercise its right of contribution against Welch, and it erred in so doing. The remedy is to either remand the case with instructions to vacate the judgment against Welch (resulting in no joint and several liability), or hold as a matter of law that, because Welch cannot be liable, there can be no joint and several liability, pursuant to *Glass*, 97 Wn.2d at 886-87.

F. If This Case is Remanded for a Second Trial, There Is No Need to Re-Try the Damages Award.

If this Court agrees that Bill's Towing's motion for directed verdict on causation should have been granted, there will be no need for a re-trial of Ms. Hayes' claims. The case should just be remanded for entry of judgment in favor of defendants. If, however, this Court disagrees on the causation issue, then the case should be remanded for a new trial of the liability issues only, with the jury being allowed to allocate fault to Billy Ray Shirley, and to decide whether Billy Ray was a trespasser to whom the landowner owed only a duty not to commit willful or wanton misconduct. Because the jury answered separate verdict form questions concerning liability and damages, and no claim of error has been raised on appeal concerning the jury's assessment of the amount of damages that

resulted from Billy Ray's death, there is no need for retrial of the amount of damages found by the first jury.

"A remand for new trial confined to particular issues is merited where the error pertains to a particular issue only and justice does not require resubmission of the entire case to the jury." *Olds-Olympic v. Commercial Union*, 129 Wn.2d 464, 482 n.22, 918 P.2d 923 (1996) (citing *Mina v. Boise Cascade Corp.*, 104 Wn.2d 696, 707, 710 P.2d 184 (1985).

Mina involved a multiple vehicle collision, with the jury finding the defendant negligent, but concluding that the plaintiff was 85% comparatively at fault. *Id.* at 697. The plaintiff appealed, arguing that the evidence did not support the giving of a jury instruction. The Court of Appeals agreed, reversed and remanded for a new trial, but ruled that the re-trial would be limited to liability issues, as the damages award had previously been determined. *Id.* at 697, 702. The Supreme Court affirmed. *Id.* Regarding limiting the re-trial to liability only, the Supreme Court concluded that "the jury was properly instructed on damages and the special verdict form contained separate questions relating to liability and damages. Further, each party had an opportunity to present evidence on the damages question."[9] *Id.* at 707.

[9] The Court noted that, if there is a possibility of a compromise verdict, then limiting retrial is improper. *Id.* at 707. The court held, however, that "[w]hile compromise verdicts were a problem when contributory negligence was a complete defense, the

Similarly, in *Bauman v. Crawford*, 104 Wn.2d 241, 248-49, 704 P.2d 1181 (1985), the Supreme Court remanded solely on the issue of liability, leaving the first jury's damages finding intact. *Bauman* involved a car and bicycle accident. The jury returned a verdict for the plaintiff in the amount of $8,000, but found the plaintiff 95% at fault. *Id.* at 243. On appeal, the plaintiff argued that the trial court erred in instructing the jury on negligence per se based on the plaintiff's violation of a local code requiring a headlight on all bicycles. *Id.* at 243-48. The Court agreed, holding that evidence of a violation of the code was admissible as evidence of negligence, but was not negligence per se. *Id.* at 247-48. Although the plaintiff sought a retrial on all issues, including damages, the Court concluded that the jury had determined the issues of liability and damages separately, as per the questions on the special verdict form, and therefore the retrial would be limited to liability only. *Id.* at 248-49.

Like *Mina* and *Bauman*, the jury here answered separate questions regarding liability and damages on the special verdict form. CP 471-73. Both sides were able to present the evidence of damages, and the jury made its decision. If the case is remanded for a second trial, it should be limited to liability issues and allocation of fault among all at-fault entities.

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possibility of compromise verdicts has been largely eliminated by the adoption of comparative negligence and the use of special verdict forms. *Id.*; *see also Bauman v. Crawford*, 104 Wn.2d 241, 248, 704 P.2d 1181 (1985).

VII. CONCLUSION

The trial court committed several errors requiring reversal of the judgment. Regarding causation, the trial court should have granted the motion for directed verdict. As such, this case should be reversed with instructions to enter judgment for defendants. However, if this Court disagrees on the causation issue, this Court should reverse and remand this case to the trial court for a new trial on liability only, with instructions to: (1) allow the jury to allocate fault to all at-fault entities, including Billy Ray Shirley; (2) allow the jury to decide whether Billy Ray was a trespasser; and (3) vacate the entry of judgment against Welch, and preclude joint and several liability for Welch's share of fault, in light of the strictures of the bankruptcy court's amended order.

RESPECTFULLY SUBMITTED this 22nd day of September, 2014.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
Mary H. Spillane, WSBA #11981
Timothy L. Ashcraft, WSBA #26196

Attorneys for Appellants Bill's Towing and Garage, Inc. and Thomas A. Lomis

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 22nd day of September 2014, I caused a true and correct copy of the foregoing document, "Brief of Appellants Bill's Towing and Garage, Inc. and Thomas A. Lomis," to be delivered in the manner indicated below to the following counsel of record:

Counsel for Respondents:
Lincoln C. Beauregard, WSBA #32878
Connelly Law Offices
2301 N. 30th Street
Tacoma, WA 98403
Phone: 253-593-0377
Email: lincolnb@connelly-law.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☑ E-file / E-mail

Counsel for Respondents:
Ashton K. Dennis, WSBA #44015
Washington Law Center, PLLC
15 Oregon Avenue, Suite 210
Tacoma, WA 98409
Phone: 253-476-2653
Email: ashton@washingtonlawcenter.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☑ E-file / E-mail

Personal Counsel for Thomas A. Lomis:
Brett Purtzer, WSBA #17283
Hester Law Group
1008 Yakima Avenue, Suite 302
Tacoma, WA 98405
Phone: 253-272-2157
Email: brett@hesterlawgroup.com

SENT VIA:
☐ Fax
☐ ABC Legal Services
☐ Express Mail
☐ Regular U.S. Mail
☑ E-file / E-mail

DATED this 22nd day of September, 2014, at Seattle, Washington.

Carrie A Custer
Carrie A. Custer, Legal Assistant